***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

77-1376

UNITED STATES COURT OF APPEALS

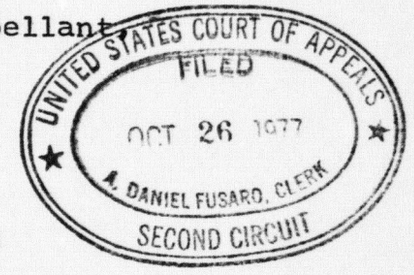
FOR THE SECOND CIRCUIT

Docket Nos. 77-1376
77-1404

B/S

UNITED STATES OF AMERICA,

Appellant,




- against -

MAXIMINO TORRES, and
AQUILES VARGAS,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

# APPELLANTS' APPENDIX

Charles L. Weintraub
Attorney for Defendants-Appellants
1345 Ave. of the Americas
New York, New York 10019
(212) 582-9300

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0720

FELONY Fel. X | 207 District | 1 Office | Disp./Sentence

V 77 CR 203

(LAST, FIRST, MIDDLE)

77 M 728

**U.S. TITLE/SECTION** | **OFFENSES CHARGED** | ORIGINAL COUNTS

21:841(a)(1)846, 18:2 — Did conspire to possess with intent to distribute heroin — 2

**CLOSED**

77-137

SUPERSEDING COUNTS

**II. KEY DATES & INTERVALS**

| ARREST or | INDICTMENT | ARRAIGNMENT | TRIAL | SENTENCE |
|---|---|---|---|---|
| U.S. Custody Began | High Risk Date | 4/14/77 | Trial Set For 6/2/77 | Disposition of Charges 6/27/77 |
| Summons Served | Information 4-8-77 | 1st Plea | NG ☐ G ☐ NOL ☐ | 7.28.77 |
| First Appearance | Indict. Waived ☐ | Final Plea 6/27/77 | G. Plea W/Drawn | Trial Began 6/27/77 |
| In Charging District | Superseding Indict/Info ☐ | NG ☒ G ☐ NOL ☐ | Trial Ended 6/27/77 | Convicted ☐ Acquitted ☐ Dismissed: ☐ On Government's Motion ☐ WOP: ☐ WP ☐ On All Charges ☐ On Lesser Offense(s) |

Voir Dire ☐

**BAIL - RELEASE**

Set $50,000 — Pers. Recog ☐ PSA ☐

Date

Bail Not Made ☐ Status Changed (See Docket) ☐

Conditions: 10% Deposit ☐ Surety Bond X Collateral ☐ 3rd Pty Cust ☐ Other ☐

**MAGISTRATE**

| | DATE | INITIAL/NO. |
|---|---|---|
| Search Warrant Issued | | |
| Search Warrant Return | | |
| Summons Issued | | |
| Summons Served | | |
| Arrest Warrant Issued | | |
| COMPLAINT ▶ | 4-1-77 | VAC 07AA |
| OFFENSE (In Complaint) | T. 21 USC §841(a)(1) - Possession with intent to distribute heroin | |

INITIAL APPEARANCE DATE ▶ 4-1-77

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled ▶ 4-4-77 2 PM — Date Held ▶

☐ WAIVED ☐ NOT WAIVED ☒ INTERVENING INDICTMENT

Tape Number

INITIAL/NO.

OUTCOME:

☐ DISMISSED

☒ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.: AUSA Gould

ATTORNEYS — Defense ☐ CJA ☒ Ret. ☐ Waived. ☐ Self ☐ None / Other ☐ PD. ☐ CD

Will get own

#2 Frederick D. Kranz (Ret)
16 Court St. B'klyn, NY
MA 5-5623/4

* Show last names and suffix numbers of other defendants on same indictment/information

TORRES 1

| DATE | (DOCUMENT NO.) PROCEEDINGS | EXCLUDABLE DELAY (a) (b) (c) (d) |
|---|---|---|
| 4-4-77 | Bail hearing reduction denied. Case set for April 8, 1977 at 2:00 PM | |
| 4-8-77 | Before CHREIN J - Indictment filed | |
| 4-14-77 | Before PLATT, J - case called - deft waives reading of the indictment and enters a plea of not guilty - motions ret. 4-29-77 at 11:30 or 10: am if not motions. Defts motion for reduction of bail argued - denied bail contd at $50000.00. | |
| 4-25-77 | Notice of motion filed, ret. 4-29-77, for Discovery and Inspection, Bill of particulars, suppressing evidence etc. | |
| 5/2/77 | Before Platt, J-case called-deft's motinn for discovery-granted & denied as indicated on the record-Deft's motion to suppress adjd to day of trial-Deft's motion for Bill of Particulars-granted and denied as indicated on the record/Deft Vargas's motion for reduction of bail-granted on condition that deft & Wife sign $100,000.00 PRB-10% cash. Bail set in this court is to be in addition to cash or surety posted in Manhattan Supreme Court-trial set down for 6/2/77.JLJ | |
| 5/2/77 | By Chrein, J order for acceptanc e of cash bail.JLJ | |

ever

FORM AO-

A1

| (DOCUMENT NO.) | | | | |
|---|---|---|---|---|
| 7/27/77 | Before Platt, J-cased called-deft & counsel present deft's motion to suppress-hearing ordered and begun hearing concluded-motion argued-denied-opinion dictated on the record-after having been advised of his rights by the court and on his own behalf deft withdraws his plea of not guilty heretofore interposed and enters a plea of guilty to count 2 of the indictment-sentence adjd w/o date-bail contd to 7/5/77 at which time a $25,000.00 cash/surety bond must be posted.jlj | | | |
| 6/29/77 | Stip that the deft will enter a plea of guilty to coutn 2 of the indictment on the condition that ~~xx~~ any issues arising from the denial deft's motion to suppress heroin seized on 3/31/77 be preserved etc.jlj | | | |
| 7.05.77 | Before Platt, J.- Case Called. Deft. & Counsel present. Deft's. motion for reduction of bail argued and denied. Bail ($25,000.00 Surety) continued. | | | |
| 7.28.77 | Before Platt, J.- Case Called. Deft. & Counsel present. Interpreter sworn. IT IS ADJUDGED on Count two (2) of the indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years and that the defendant shall become eligible for parole under Title 18, United States Code, Section 4205(b)(2), at such time as the Parole Commission may determine; and that the defendant shall serve a Special Parole TErm of ten (10) years. On motion of the Assistant United STates Attorney, Douglas Mansfield, Count one (1) of the indictment is ordered dismissed. Clerk to file notice of Appeal. | | | gp |
| 7.28.77 | Judgment and Commitment filed. Certified Copies to Marshal and Probation. | | | gp |
| 7.28.77 | Financial Affidavit filed received from Chambers. | | | gp |
| 7.28.77 | Notice of Appeal filed without fee by Clerk. | | | gp |
| 7.28.77 | Certified Copy of Docket entries, Duplicate copy of notice of appeal together with Form A mailed to the Court of Appeals. | | | gp |

A TRUE COPY
ATTEST
DATED 7-28-77 19
LEWIS ORGEL
CLERK
BY
DEPUTY CLERK

FINE AND RESTITUTION PAYMENTS

| DATE | RECEIPT NUMBER | C.D NUMBER | DATE | RECEIPT NUMBER | C.D NUMBER |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |
| | | | | | |

A2

DOCKET - U.S. District Court

JUDGE/MAGISTRATE Assigned: 0720 | 207 District | 1 Office | Disp./Sentence

FELONY Fel

U.S. vs MAXIMINO VARGAS (LAST, FIRST, MIDDLE)

77 CR 203

JUVENILE

Case Filed Mo. 4 Day 8 Yr 77 Docket No. 203 Def. 1

No. of Defs * 2

PLATT, J.

U.S. TITLE/SECTION | OFFENSES CHARGED | ORIGINAL COUNTS

21:841(a)(1) 846, 18:2 — Did conspire to possess with intent to distribute heroin — 2

SUPERSEDING COUNTS

CLOSED

U.S. MAG. CASE NO. ▶ 77 M 728

BAIL • RELEASE

Denied | AMT Set $50,000 | Fugitive | Pers. Recog. | PSA

Conditions: Date | 10% Deposit | X Surety Bond | Collateral | Bail Not Made | Status Changed (See Docket) | 3rd Pty Cust | Other

II. KEY DATES & INTERVALS

| ARREST or | INDICTMENT X | ARRAIGNMENT | TRIAL | SENTENCE |
|---|---|---|---|---|
| U.S. Custody Began | High Risk Date; Information 4-8-77 | 4/18/77 | 6/2/77 | 6/27/77 — 7.28.77 |
| Summons Served | Indict. Waived | Set Plea: (1) | NG G NOLO | Plea: Convicted / On All Charges / On Lesser * Offense(s) |
| First Appearance | In Charging District; Superseding Indict/Info | Trial Ready: 6/27/77 | Plea: NG X G NOLO; Withdrawn | Dismissed: WOP WP |
| | | Set Trial: 6/27/77 | Trial Started: 6/27/77 | On Government's Motion |

MAGISTRATE

| | DATE | INITIAL/NO |
|---|---|---|
| Search Warrant: Issued | | |
| Search Warrant: Return | | |
| Summons: Issued | | |
| Summons: Served | | |
| Arrest Warrant Issued | | |
| COMPLAINT ▶ | 4-1-77 | VAC 07AA |
| OFFENSE (In Complaint) | T. 21 USC §841(a)(1) - Possession with intent to distribute heroin | |

INITIAL APPEARANCE DATE ▶ 4-1-77

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ▶ 4-2-77 2 PM; Date Held ▶

WAIVED | NOT WAIVED | X INTERVENING INDICTMENT | Tape Number

INITIAL NO.

OUTCOME: DISMISSED | HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT | HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.: AUSA GOULD

ATTORNEYS: Defendant X | Self | None | Other | FD | CJA

Will get own

Charles Weintraub, Esq. (Ret)
1345 Avenue of the Americas NYC
(212) 582-9300

* Show last names and suffix numbers of other defendants on same indictment/information

VARGAS 2

| DATE | (DOCUMENT NO.) PROCEEDINGS | EXCLUDABLE DELAY (h) (i)-(p) |
|---|---|---|
| 4-4-77 | Bail hearing reduction denied. Case set for April 8, 1977 at 2:00 P | |
| 4-7-77 | Magistrate bond executed. Bail reduced by Judge Costantino on 4-6-77. Bail reduced to $10,000 Cash. Cash deposited - Receipt Nos 093874 and 093875. | |
| 4-8-77 | Before CHREIN J - Indictment filed | |
| 4-14-77 | Before PLATT, J - case called - deft & atty present - deft waives reading of the indictment and enters a plea of not guilty. Motions ret. 4-29-77 at 11:30 or 10 am if not motions. Bail $10,000 cash contd. | |
| 4-25-77 | Notice of motion filed, ret. 4-29-77, for Bill of Particulars, Discovery and Inspection, suppressing evidence, etc. | |
| 5/2/77 | Before Platt, J-case called-deft's motinn for discovery-granted & denied as indicated on the record-Deft'smotion to suppress adjd today of trial-Deft's motion for Billof Particulars-granted and denied as indicated on the record. Deft Vargas's motion for reduction of bail-granted on condition that deft & wife sign $100,000.00 PRB-10% cash. Bail set in this court is to be in addition to cash or surety posted in Manhattan Supreme Court-trial set down for 6/2/77. | |

FORM AO256

A3

OPPOSITE THE APPLIC. E DOCKET ENTRIES SHOW. IN SECTION V, ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

| DATE | IV. PROCEEDINGS (continued) PAGE TWO (DOCUMENT NO.) | V. EXCLUDABLE DELAY Interval Section II (a) | Start Date End Date (b) | Ltr. Code (c) | Total Days (d) |
|---|---|---|---|---|---|
| 6/27/77 | Before Platt, J-case called-defts & counsel present ddft's motion to suppress-hearing ordered and begun hearing concluded-motion argued-denied-opinion dictated on the record-after having been advised of his rights by the court and on his own behalf deft withdraws his plea of not guilty heretofore interposed and enters a plea of guilty to count 2 of the indictment-sentence adjd w/o date/-bail contd to 7/5/77 @ which time a $25,000.00 cash/surety bond must be posted.jlj | | | | |
| 6/29/77 | Stip that the defendantwill enter a plea of guilty to count 2 of the ~~it~~ indictment on the dondition that any issues arising from the denial deft's motion to suppress heroin seized on 3/31/77 be preserved etc.jlj | | | | |
| 7.5.77 | Before Platt, J.- Case Called. Deft. & Counsel present. Deft's. motion for reduction of bail argued and denied. Bail ($25,000.00 Surety) continued. | | | | gp |
| 7.28.77 | Before Platt, J.- Case Called. Deft. & Counsel present. Interpreter sworn. IT IS ADJUDGED on Count two (2) of the indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years and that the defendant shall become eligible for parole under Title 18, United States Code, Section 4205(b)(2) at such time as the Parole Commission may determine; and the defendant shall serve a Special Parole Term of ten (10) years. On motion of the Assistant United States Attorney, Douglas Mansfield, Count one (1) of the indictment is ordered dismissed. Clerk to file notice of Appeal. | | | | gp |
| 7.28.77 | Judgment and Commitment filed. Certified Copies to Marshal and Probation. | | | | gp |
| 7.28.77 | Financial Affidavit filed received from Chambers. | | | | gp |
| 7.28.77 | Notice of Appeal filed without fee by Clerk. | | | | gp |
| 7.28.77 | Certified Copy of Docket entries, Duplicate copy of Notice of Appeal together with Form A mailed to the Court of Appeals. | | | | gp |
| 8-8-77 | Judgment & commitment retd and filed - deft. del. to MCC, NY. | | | | |
| 9-21-77 | Scheduling order filed that the record on appeal be docketed on or before 9-26-77. | | | | |
| 9.22.77 | Order filed received from the Court of Appeals that the appeal be docketed and the record filed on or before September 26th, 1977. | | | | gp |
| 9.23.77 | Stenographer's Transcript dated June 27th, 1977 filed. | | | | gp |
| 9.23.77 | By Platt, J.- Order releasing Bail filed. | | | | gp |
| 9.23.77 | By Platt, J.- Order releasing Bail filed. | | | | gp |
| 9-26-77 | Record on appeal certified and handed to Charles Weinstaub counsel for deft for delivery to the court of appeals. | | | | |
| 9-26-77 | Voucher for compensation filed & forwarded for payment. | | | | |

FINE AND PESTITUTION PAYMENTS

| DATE | RECEIPT NUMBER | C.D. NUMBER | DATE | RECEIPT NUMBER | C.D. NUMBER |
|---|---|---|---|---|---|
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| | | | | | |
| | | | | | |

A4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

MAXIMINO TORRES and
AQUILES VARGAS,

Defendants.

- - - - - - - - - - - - - - - - X

Platt D

INDICTMENT

Cr. No. 77CR203
(T. 21, U.S.C., §841(a)(1) §846 and T. 18, U.S.C., §2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about March 31, 1977, within the Eastern District of New York, the defendants MAXIMINO TORRES and AQUILES VARGAS along with others known and unknown to the Grand Jury did conspire, agree, and confederate to possess with intent to distribute approximately four hundred fifty-nine (459) grams net weight of heroin hydrochloride, a Schedule I narcotic drug controlled substance in violation of Title 21, United States Code, Section 841(a)(1). (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 31st day of March, 1977, within the Eastern District of New York, the defendants MAXIMINO TORRES and AQUILES VARGAS did knowingly and intentionally possess with intent to distribute approximately four hundred fifty-nine (459) grams net weight of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2).

A TRUE BILL

FOREMAN

A5

AFTERNOON SESSION

THE COURT: All right, gentlemen.

I have considered your arguments that you made before lunch, and I have not had time to delineate specific findings of fact other than to find--which I do--that all of the testimony and proof produced by the Government is uncontradicted.

And the Court finds nothing to cast any doubt, any question, upon the veracity of the testimony given by the agents, and, therefore, fully credits all of the testimony given by the agents.

The record thus made will constitute the findings of fact by the Court.

And the Court also notes specifically--has taken note of the two cases cited to it and relied principally on by the defendants, United States against Santana, 485 F. 2d 365.

I am told by Mr. Nims there is no interpreter.

Do you wish to have an interpreter for this?

MR. KRANZ: I will waive it for my client, your Honor.

MR. WEINTRAUB: Yes. I don't think it's required at this point, your Honor.

THE COURT: That's 1973.

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2046

And United States against Tramuanti, 513 F. 2d 1087.

And the Court, of course, already pointed out to defense counsel the Husty against the United States, 282 US 694, 51 Supreme Court 240; Brown against United States 404 F. 2d, Fifth Circuit, 1968; Saldana against Beto, the Fifth Circuit case; Chimel against California, I can't get that citation, 395 US 752, 1969; and United States against Tramuanti, which is the most recent of those cases, it's a Second Circuit case decided 1975, Judge Oakes (phonetic spelling) speaking for the Court of Appeals stated that the Supreme Court has made it clear, whereover, that a different set of rules prevails as to searches of automobiles, as opposed to homes or offices, provided that there is probable cause to believe that the car contained articles that the officers are entitled to seize, Chambers against Maroni, 399 US 42, 48, Supreme Court, 1975, 1979, 26 lawyer's edition 419, 1970, search for guns and stolen money, Carroll against United States, 267 US 142, 45, Supreme Court 28069, lawyer's edition 543, 1975.

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2046

The question is, therefore, as the Court stated this morning, whether there was probable cause to believe that the defendants' car contained heroin.

The Court has considered the Santana facts, but apart from the facts in that case, the Government conceded the probable cause question. The facts are here substantially different.

In that case the restaurant from which narcotics eminated was known, presumably by reputation, to be a headquarters for narcotic trade.

Whereas in this case Mr. Chan Rodriguez was known in fact to have sold heroin an hour or so before to a government informant and was further known in fact to have additional heroin on the premises for sale. And it was further known in fact that his practice was to get rid of the same by additional sales as promptly as possible.

In that case the Agent saw a prominent figure in the trade emerge with a brown paper bag, go to another place, and emerge with another brown paper bag.

Here the defendants were observed entering emptyhanded and emerging with the Second Circuit has

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2646

characterized as, quote, a sort of hallmark of the narcotics business, ie, the brown paper bag, United States against Santana at Page 485.

Most significantly here, however, are the circumstances of the pursuit of the defendants in possession of the contraband, and particularly the testimony of the agents with respect to the circuitous route, replete with a U turn and backtracking, and as to the thirtive rear view mirror observations of the defendant driver, and the back window inspections by the defendant passenger.

Although the Second Circuit Court of Appeals has recently questioned this Court's awareness of a distinction between evidence of guilt and consiousness of guilt, the United States against Linda B. Stafano, slip opinion, 1176 - 1581, 1582, May 16th, 1977.

Let there be no mistake in this case that such fertive activity in this Court's mind fully qualifies for the famous description ennunciated some nearly 400 years ago by the famous William Shakespeare in Henry VI, Part 4, Act 5, Scene 6, Line 11, is, quote, suspicion always haunts the guilty mind that fate does fear each bush and officer,

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2046

unquote.

In short, such conduct is clear evidence of consciousness of guilt and such evidence together with all other proof constitutes sufficient probable cause and more to justify a search and arrest in this case.

For the foregoing reasons defendants' motion to suppress must be denied.

All right, gentlemen.

MR. WEINTRAUB: Judge, the motion to suppress the statements still stands. I believe the proof there was not sufficient. The Officer merely stated--the Agent merely stated he gave them their rights and did not state what those rights were, did not state he asked whether the defendants understood them. And that's particularly probative in light of Mr. Torres' somewhat use of the English language. And I, therefore, renew my motion to suppress the statements of Mr. Torres that he is not a narcotics user, and especially since it appears on his personal history form, which is part of the normal processing.

And I think we have a statement which is part of the normal processing of a defendant after

PENSAD CO., BAYONNE, N.J. 07002 - FORM 2046

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Appellee, :

Docket Nos. 77-1376
vs. : 77-1404

MAXIMINO TORRES, and :
AQUILES VARGAS,

: AFFIDAVIT OF SERVICE

Defendants-Appellants.

----------x

STATE OF NEW YORK )
) SS:
COUNTY OF NEW YORK )

THERESA V. MADSEN, being duly sworn, deposes and says:

On October 20, 1977, I mailed a copy of the Appellants' Appendix in the above-captioned matter to the Office of the United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, by personally depositing a true copy of same in a official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York.

Theresa V. Madsen
THERESA V. MADSEN

Sworn and subscribed to before
me this 27th day of October 1977.

Andrew R. Cooper

ANDREW R. COOPER
Notary Public, State of New York
No. 31-4620907
Qualified in New York County
Commission Expires March 30, 1979